IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6230 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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M.B. GANDHI, PRESIDENT

Versus

CHANDRAKANT RAMANLAL PANDYA

Appearance:

1. Special Civil Application No. 6230 of 1990

MR ARUN H MEHTA for Petitioner No. 1

MR JD AJMERA for Respondent No. 1

RULE SERVED for Respondent No. 2

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 05/09/2002

ORAL JUDGEMENT

#. The age old controversy crops up before this Court once again, whether punishment imposed in departmental

proceeding on a delinquent is proportionate and whether the Tribunals / High Courts have power to or have jurisdiction to alter, modify, reduce such penalty and whether the Tribunals / High Courts enjoy such jurisdiction, then what is the nature of the said jurisdiction. The law as has been vehemently argued by learned Senior Counsel Mr.Arun H. Mehta is well settled by the decisions of the Apex Court as well as other High Courts. Principles of law in each case will have application to the facts of the given case and therefore, necessary facts of the case shall have to be looked into.

#. The record reveals that the respondent No.1 herein - Chandrakant R. Pandya was appointed as Junior Clerk in the management of present petitioner - Nutan Kelavani Trust, Palanpur on 12th of July, 1979. He was promoted as Senior Clerk on 1st of April, 1984.

#. The respondent No.1 herein faced chargesheet at the end of the management - petitioner on 26th May, 1987. The management petitioner appointed one Dhanjibhai as Inquiry Officer who conducted the departmental proceeding. After recording of the evidence, the inquiry officer vide his conclusion dated 4th of March, 1988 found the present respondent No.1 guilty in respect of almost 23 charges out of 25 allegations levelled against respondent No.1. Therefore, the management decided to dismiss the respondent No.1 and served him with show cause notice and came to the final conclusion to dismiss the respondent No.1. Since the provisions of Section 36[B] of the Gujarat Secondary Education Act requires that proposed action of the management must be approved in writing by the Officer authorised in this behalf by the Board and therefore, school management approached the District Education Officer for obtaining approval as per Section 36[1][b] of the said Act. Section 36[2] further provides that if proposed action is not approved by the authorised Officer and District Education Officer, in this case, within 45 days then the same shall be deemed to have been approved by the said Officer. The facts further go to show that though the District Education Officer by his order dated 6th June, 1988 did not accord approval of dismissal of respondent No.1 as proposed by the school management but since the order passed by DEO, an authorised officer, was beyond 45 days, the proposal to dismiss the respondent No.1, assumed deemed approval of District Education Officer. Respondent No.1 therefore with effect from 3rd June, 1988 came to be dismissed from service and being aggrieved and dissatisfied, filed an application being Application No.501 / 1988 before the Gujarat Secondary Education Tribunal at Ahmedabad. Vide

his judgment and order dated 16th July, 1990, learned Education Tribunal came to the conclusion that the charges against the respondent No.1 therein were properly proved and the departmental inquiry was properly conducted. Learned Tribunal did not interfere so far as the finding of the inquiry officer was concerned in respect of the charges levelled against the respondent No.1. However, learned Education tribunal further came to the conclusion that charges levelled against the respondent No.1 were trifling in nature and thereafter relying on the decision of this Court in case of SATSANGI SHISHUVIHAR KELAVANI TRUST & ORS V. P.N. PATEL AND ORS. as reported in [18] 1977 GLR pg.615, learned Education Tribunal found that it was fit case where though the majority of the charges were proved, punishment of dismissal and termination would not be justified and hence, the tribunal directed reinstatement of respondent No.1 from the date of decision of the Education Tribunal and further directed that the respondent No.1 would not be entitled to wages from 3rd of June, 1988 till he would be reinstated, as in view of the Education Tribunal, this economic loss was sufficient punishment which would have deterrent effect on the respondent No.1 and the irregularity, negligence and unbecoming behaviour towards superior would not be repeated.

#. Being aggrieved and dissatisfied with the above said judgment and order of the Education Tribunal, Management through its President has approached this Court by way of this petition under Article 227 of the Constitution of India.

#. Learned Senior Counsel Mr.Arun H. Mehta on behalf of the petitioner and learned counsel Mr.J.D. Ajmera on behalf of the respondent No.1 were heard at marethon length. Respondent No.2 - District Education Officer, Palanpur, District : Banaskantha is not an effective party.

#. While admitting this petition on 9th October, 1990, this Court was pleased to pass the following interim order.

"Rule. Mr.Ajmera waives service of Rule.

Interim relief only to the effect that it would be open to the petitioner to reinstate the respondent No.1 in service or to pay and continue to pay him his salary regularly without physically reinstating and without taking even work from him. The salary for August / September, 1990 to be paid before 17th October,

1990. .... "

#. The above interim relief holds the field today.

#. Learned Senior Counsel Mr.Mehta mainly argued that what are the powers of the Tribunal / High Court while dealing with proportion of punishment in departmental proceedings. Learned Senior Counsel Mr.Mehta contended that the tribunals / High Courts cannot substitute their own punishment in place of punishment awarded by the administrative authority in departmental proceedings. It was further argued that the Tribunals / High Courts do not enjoy or exercise primary power to review the proportion of punishment awarded by the competent authority. It was contended that it is established by various decisions of the Apex Court and it is settled law today that High Courts / Tribunals can only exercise the powers of secondary review, that too, after following Wednesbury principles of review and interference in proportion of punishment in departmental proceedings. It is argued that the primary jurisdiction to award punishment to a delinquent always remains with the competent authority who by law, might have been appointed to award punishments. Such punishment as awarded by this competent authority cannot be modified or altered by the High Court / Tribunal assuming the powers of primary review and substitute their own punishment in place of choice of punishment of competent authority. The case law relied on by learned Senior Counsel Mr.Mehta will be referred hereinafter. He further argued that against respondent No.1, charges like; not recording of time of joining duty, not to be found on place of work, negligence in duty, indulgence in unnecessary correspondence, addressing correspondence directly to superior without being routed through Head of the department, not remaining present on the auspecious day of independence, on which day, special programme was arranged, lapses in writing daily cash book, etc. are proved. It was argued that these charges are grave and serious in nature and if such an employees is allowed to continue in the administration, it would not be in the interest of the administration as well as it would affect smooth running of the administration. It is argued that it became very difficult to take work from respondent No.1 due to his above said behavior and hence, it was contended that punishment of dismissal was proportionate to the charges proved against the delinquent. As argued it was choice of the management being competent authority to award punishment to the delinquent and exercising the discretion in the best manner, management being competent authority in the above circumstances chose to award

punishment of dismissal and the action of the management became final. It was argued that so far charges levelled against the delinquent are concerned, the same were held to be proved by the inquiry authority as well as before the Tribunal. Charges therefore, according to the learned counsel Mr.Mehta, finally stood proved and no further action against this, have been taken by the delinquent. It was argued that however the Education Tribunal so far as the proportion of punishment is concerned, assumed the jurisdiction of primary review and substituted its own punishment in place of punishment awarded by the competent authority. It was argued vehemently that this conclusion of the Education Tribunal was in sheer contravention of the established law of this Country. It was argued that learned Tribunal misread the decision of this Court reported in 18th GLR pg.615 [Supra]. It was also argued that learned Tribunal failed to assign sound and cogent reasons which were required while exercising the secondary review as per the law. It was argued that when charges levelled against the delinquent were finally stood proved, it was not proper on the part of the Education Tribunal to consider the proportion of the punishment in a primary review and substitute its own punishment. It was argued that therefore the order passed by the Education Tribunal impugned in this petition is required to be set aside.

#. Learned Senior Counsel Mr.A.H.Mehta for petitioner in support of his contentions cited following case law.

[i] In case of UNION OF INDIA V. G. GANAYUTHAM as reported in AIR 1997 SC 3387.

In the decision, the main question was whether it was permissible for the Court / Tribunal to interfere with the quantum of punishment imposed by the competent authority on the ground that it was to severe and hence, disproportionate to the gravity of the charges proved. After referring to Wednesbury principles of reasonableness, the Apex Court has observed in para-30 as under :

"30. In Ranjit Thakur [AIR 1987 SC SC 2386]
this Court interfered with the punishment only after coming to the conclusion that the punishment was in outrageous defiance of logic and was shocking. It was also described as perverse and irrational. In other words, this Court felt that, on facts, Wednesbury and CCSU tests were satisfied. In another case in

B.C.Chaturvedi v. Union of India [1995] 6 SCC 749 : [1995 AIR SCW 4374] a three Judge Bench said the same thing as follows [Para 18 of AIR]:

"The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusions on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellant authority shocks the conscience of the High Court / Tribunal it would appropriately mould the relief, either by directing the disciplinary authority / appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare case, impose appropriate punishment with cogent reasons in support thereof."

Similar view was taken in India Oil Corporation v. Ashok Kumar Arora [1997] 3 SCC 72, that the Court will not intervene unless the punishment is wholly disproportionate."

[ii] In the matter of SANCHALAKSHRI AND ANOTHER V. VIJAYAKUMAR RAGHUVIRPRASAR MEHTA AND ANOTHER reported in [1998] 8 SCC 245.

Learned counsel for the petitioner relying upon para-6 of the decision which is as under :-

"6. After a review of earlier cases, this Court in B.C.Chaturvedi v. Union of India has held that : [SCC p.762, para 18]

"The High Court / Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court / Tribunal, it would appropriately mould the relief, either directing the disciplinary / appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

Neither the Tribunal nor the High Court in this case has held that the punishment imposed upon respondent 1 was shockingly disproportionate.

Respondent 1 was a school teacher. A teacher is expected to maintain higher standard of honesty and integrity in view of the position he holds. He committed acts of forgery either himself or with the held of some other person by forging signatures of the District Education Officer, the Auditor and the Sanchalak and Principal of Pallavi Vidyalaya. Even after he was called upon by the School Management to disclose the names of the persons who had put their signatures in the service book, he had stated that it was signed by the District Education Officer, Mr.S.M.Parmar. That statement was false to his knowledge. It was on the basis of the forged endorsements that he wanted to get payments as per the revised pay scale regularised. Respondent 1 had thus not only committed a serious misconduct but also a serious criminal offence. If under such circumstances, the punishment of dismissal was imposed by the School Management, it cannot be said that it was shockingly disproportionate to the gravity of the misconduct."

[iii] In the matter of SHRIJI VIDHALAYA AND ANOTHER VS. PATEL ANIL KUMAR LALLUBHAI AND ANOTHER as reported in [1998] 9 SCC 561, relevant parts on which learned counsel Mr.Mehta placed reliance are paras-4 to 7, which runs as under :

"4. Learned Senior Counsel appearing for the appellants submitted that the Tribunal exceeded its review jurisdiction and the power to award appropriate punishment vests normally with the management and the Tribunal cannot exercise that power. According to him the High Court failed to appreciate. He further contended that the Tribunal has no jurisdiction to reduce or award lesser punishment substituting its own punishment in the place of punishment given by the disciplinary authority.

5. Learned counsel for the first respondent while inviting our attention to the provisions of Section 36, 38 and 39 of the Act, submitted that the Tribunal has power to go into the matter and give its own finding as well as to substitute the punishment.

6. We do not think that the abovesaid sections enable the Tribunal to exercise such power.

7. This Court has consistently held that the tribunal / court normally cannot substitute its punishment in the place of punishment given by the disciplinary authority vide Union of India v. Parmar Nanda and B.C.Chaturvedi v. Union of India. Applying the said principle, we allow the appeal and set aside the order of the High Court which confirmed the order of the Tribunal. No costs."

[iv] In the matter of OM KUMAR VS. UNION OF INDIA as reported in 2000 SC 3689, of which, para-67, 70 and 71 are relied by learned Senior Counsel Mr.Mehta, which are reproduced as under;

"67. But where, an administrative action is challenged as arbitrary' under Art.14 on the basis of Royappa [as in case where punishments in disciplinary cases are challenged], the question will be whether the administrative order is "rational" or "reasonable" and the test then is the Wednesbury test. The Courts would then be confined only to a secondary role and will only have to see whether the Administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary [In G.B. Mahajan v. Jalgaon Municipal Council [1991] 3 SCC 91 at p.111 : [AIR 1991 SC 1153 at pg.1165], Venkatchallah, J. [as he then was] pointed out that "reasonableness" of the Administrator under Art.14 in the context of Administrative Law has to be judged from the standpoint of Wednesbury rules. In Tata Celluar v. Union of India [1994] 6 SCC 651 at Pp. 3369-70 : AIR 1996 SC 11] : Indian Express Newpapers v. Union of India [1985] 1 SCC 64] at p.691 : [AIR 1986 SC 515 at Pp.542-43] : Supreme Court Employees' Welfare Association v. Union of India [1989] 4 SCC 187 at Lab IC 324 at p.358] and U.P. Financial Corporation v. GEM CAP [India] pvt. Ltd. [1993] 2 SCC 299, at P.307 : [1993 AIR SCW 1439], while judging whether administrative action is arbitrary under Art.14 [i.e otherwise than being discriminatory], this Court has confined itself to a Wednesbury review always.

70. In this context, we shall only refer to these case. In Ranjit Thakur v. Union of India [1987] 4 SCC 611 : [AIR 1987 SC 2386 : 1988 Cri LJ 158], this Court referred to "proportionality' in the quantum of punishment but the Court observed that the punishment was "shockingly" disproportionate to the misconduct proved. In B.C. Chaturvedi v. Union of India [1995] 6 SCC 749 : [1995 AIR SCW 4374 : AIR 1996 SC 484 : 1996 Lab IC 462], this Court stated that the Court will not interfere unless the punishment awarded was one which shocked the conscience of the Court. Even then, the Court would remit the matter back to the authority and would not normally substitute one punishment for the other. However, in rare situations, the Court could award an alternative penalty. It was also so stated in Ganayutham.

71. Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as "arbitrary" under Art.14, the Court is confined to Wednesbury Principles as secondary reviewing authority. The Court will not apply proportionality as a primary reviewing Court because no issue of fundamental freedoms nor of discrimination under Art.14 applies in such a context. The Court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the Administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the Courts, and [in] such extreme or rare cases can the Court substitute its own view as to the quantum of punishment."

##. In a decision of this Court in Special Civil Application No.8053 of 1998 as decided by learned Single Judge of this Court on 25th of July, 2002, this Court after relying upon principle of Wednesbury and the law as laid down by the Supreme Court as mentioned in above cases found that dismissal of an employee of Bank justified for the charge of misbehavior with client of the Bank proved against him.

##. Learned counsel for the petitioner in summing up

further argued that it is not the findings of the Education Tribunal that the departmental proceeding was irregular or illegal. No procedural illegality was noticed by the tribunal. The competent authority in exercising choice to inflict the punishment, did not act irrationally because the employee was indisciplined and was not at all working and hence punishment of dismissal was justified.

##. On the other hand, learned counsel Mr.J.D.Ajmera for respondent No.1 contended that this is an incident from the private management of school. So far as management of school is concerned, it remains absolutely in the hands of its Board. It was generally argued that in such management, it is first decided that a person from the management is to be removed and then charges are fabricated. Learned counsel Mr.Ajmera submitted that vindictive attitude of the management could be noticed by the simple fact that for the so called lapses around 19th of January, 1987, the chargesheet was served against the present respondent No.1 after about nine months on 21st October, 1987. It was argued that the respondent No.1 had been working with the management right from 1979 as Junior Clerk. He was promoted as Senior Clerk in 1982. Till day of 19th January, 1987, the respondent No.1 was working properly and no grievance at all at any time before 19th of January, 1987 was expressed against the respondent No.1 in respect of his work and behaviour in the management school. It was argued that however the table appears to have turned from 19th of January, 1987 and the charges twenty five in number pertaining to period after 19th of January, 1987 were levelled. It was argued that therefore it was first decided to remove the respondent No.1 from the school and thereafter, the charges were digged up. It is also argued that in fact, the respondent No.1 was working very hard even in absence of two other posts of Junior Clerks which were vacant since the same were not filled up at the relevant time and the respondent No.1 had to struggle to cope up with the work which was entrusted to him. It was argued that in this process in 1984 and in 1987, respondent No.1 expressed his grievance to the Head Master, management of the school and to the District Education Officer. It was argued that this caused annoyance to the management and therefore after January, 1987, hard days came to be faced by the respondent No.1 from the ends of management to the extent of departmental proceedings, for which, he was found guilty by the management. It was argued that all the charges levelled against the respondent No.1 are too vague and general. It was argued that that charges are proved but considering overall scenario and the

circumstances, learned Education Tribunal exercising proper jurisdiction set aside the punishment of dismissal. It was argued that the management did not act reasonably. It was argued that the whole controversy inflamed due to the fact that there were two other vacant posts of the Junior Clerks which were not being filled up by the management resulting into very heavy burden of work on respondent No.1. Learned counsel Mr.Ajmera relying upon decision of this Court in the matter of SATSANGI SHISHUVIHAR KELAVANI TRUST & ORS V. P.N. PATEL AND ORS. as reported in 18th GLR pg.615 [Supra], argued that Education Tribunal while setting aside punishment of dismissal accepted the contentions of respondent No.1 that he was over burdened because of two posts of Junior Clerk vacant in the school. It was argued that these two posts are still vacant today. It was further contended that after accepting this contention of respondent No.1, the tribunal set aside the penalty of dismissal and expressed hope that two vacant posts of Junior Clerk would be filled in by the management. It was therefore contended that though charges were proved against the respondent No.1, but assigning for the cogent and sound reasons, tribunal rightly set aside the punishment of dismissal and directed reinstatement. It was contended that tribunal had jurisdiction and power by virtue of decision as reported in 18th GLR pg.615 in the matter of SATSANGI SHISHUVIHAR KELAVANI TRUST & ORS V. P.N. PATEL AND ORS. [Supra] to quash the punishment of dismissal. It was contended that therefore there was no error committed on the part of the Education Tribunal either of jurisdiction or on factual aspect. It was argued that since vindictiveness of the management is apparent, no relief be granted to the petitioner as to interfere with the conclusion of the Education Tribunal in respect of proportion of punishment. Learned advocate Mr.Ajmera contended that the inquiry in question was not conducted properly. But ultimately, this argument was not advanced in view of conclusion of the Education Tribunal that the inquiry against the respondent No.1 was properly conducted. Learned advocate Mr.Ajmera in second phase of his arguments contended that relief under Article 226 and 227 of the Constitution can be granted to the petitioner whose conduct satisfies the conscience of the Court. It was argued that the petition under Article 226 and 227 of the Constitution can be dismissed solely on the ground that the conduct of the petitioner disentitle him to have sancrosant and extra ordinary relief under Article 226 and 227. My attention was drawn to the affidavit-in-reply filed by the respondent No.1 and the interim order passed by this Court as narrated above. It was argued that inspite of the interim order of this

Court, the respondent No.1 was not paid his salary regularly by the petitioner management. My attention was also drawn to page.124, wherein as statement is placed on record that how salary is paid late by the petitioner. It was argued that since the petitioner in pursuance of the interim order passed by this Court did not pay salary to the respondent No.1 regularly, Civil Application No.1774 / 1995 came to be filed and vide order dated 29th August, 1996, this Court again directed the petitioner to pay salary within period of three months from the date of award. A copy of the order is placed at Page.126 Annexure-B to affidavit-in-reply. It was argued that even then, respondent No.1 was not paid his salary and had to file contempt application. However, it has come on notice that on being served with the notice of application for contempt, the petitioner paid salary to respondent No.1 though respondent No.1 had dispute about calculation of salary. It was therefore argued that such petitioner who disobeys the order of this Court, is not entitled to extraordinary remedy under Article 226 and 227 of the Constitution of India. It was argued that the petition is required to be dismissed solely on this ground. Learned advocate Mr.Ajmera for the respondent No.1 relied upon a decision of the Apex Court in the matter of MOHD. YUNUS V. MOHD. MUSTAQIM AND OTHERS as reported in AIR 1984 SC 38. Having relied on this decision of the Apex Court, it was argued that a mere wrong decision without anything more is not enough to attract the jurisdiction of the High Court under Article 227 of the Constitution of India. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is limited "to seeing that an inferior Court or Tribunal functions within the limits of its authority" and not to correct an error apparent on the face of the record much less an error of law. In exercising the supervisory power under Art.227, the High Court does not act as an appellate Court or Tribunal. It will not review or reweigh the evidence upon which the determination of the inferior court or tribunal purports to be based or to correct errors of law in the decision. It was therefore argued that no jurisdiction or no error of law is committed by the Tribunal and the petition is required to be set aside.

##. Having regard to the rival contentions, facts on record of the case and law cited, it is required to be examined that what powers Tribunal / High Court exercises while dealing with quantum of punishment awarded by administrative or competent authority. The law cited by learned Senior Counsel Mr.Mehta on behalf of the petitioner undoubtedly establishes that all the High

Courts / Tribunals exercise the powers of secondary review. To this extent, learned advocate Mr.J.D.Ajmera for the respondent No.1 also has no quarrel. The Supreme Court in the decisions referred to above has amply made clear that primary power to inflict the penalty remains with the authority which is empowered to award punishment. The Court or Tribunal cannot substitute their own view for the quantum of punishment in lieu of the punishment awarded by the competent authority. What is meant by jurisdiction of secondary review is well explained by the Apex Court in the above said decision in the matter of OM KUMAR VS. UNION OF INDIA as reported in 2000 SC 3689 and this requires no further discussion. The question therefore is, whether tribunals / Courts in secondary review have power to modify punishment awarded in disciplinary proceeding ? and if `Yes', then to what an extent. This controversy also is decided by the Apex Court in the decisions referred to above as cited by learned Senior Counsel Mr.Mehta for the petitioner. In short, if punishment imposed by the competent authority or the appellate authority shocks the conscience of the High Court / Tribunal, it would appropriately mould the relief either by directing the disciplinary authority / appellate authority to consider the penalty imposed or to shorten the litigation, it may itself in exceptional and rare case impose appropriate punishment with cogent reasons in support thereof. The Supreme Court in above said cases, particularly, in the matter of OM KUMAR VS. UNION OF INDIA as reported in 2000 SC 3689 [Supra] decided that Wednesbury principles in such circumstances are required to be followed. The Supreme Court in para-25 of the decision narrated the Wednesbury principles. In short, according to Wednesbury Principle, when a statute gives discretion to an administrator to take a decision, the scope of judicial review would remain limited. When the order is contrary to law or relevant factors were not considered and irrelevant factors were considered, the decision was one which no reasonable person would have taken are the reasons for interfering with the decision of the administrative authority. In para-28 of the said decision, Supreme Court also observed regarding the proportionality which may be construed with reference to the present case as proportionality of the punishment. The Supreme Court observed that proportionality means while regulating the exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the Legislature or the Administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the Legislature and

the administrative authority, maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve. The Legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court to decide. In all above decisions, the principles laid down by the Apex Court in the case of Ranjit Thakur [AIR 1987 SC SC 2386] and in case of B.C.Chaturvedi v. Union of India as reported in [1995] 6 SCC 749 : [1995 AIR SCW 4374] are followed. In sum and substance, the penalty imposed by the administrative authority can be modified only within limits and as guidelines establish by Supreme Court as said above, after following Wednesbury principle. This is so because the Court and Tribunal enjoys power of second review and cannot substitute its own view in place of penalty imposed by the competent authority. The Court / Tribunal may modify the quantum of punishment, in my view, having regard to the above said exposition of law by the Apex Court, in the following circumstances only.

[i] want of good faith
[ii] victimization by employer
[iii] basic error or violation of principles of natural justice
[iv] finding employee guilty, the punishment / penalty imposed is disproportionate and unreasonable and having regards to the facts of the case, no reasonable person would come to conclusion arrived at by such authority.

[v] colourable exercise of power or want of bona fide.

##. Therefore, these are the factors to be taken into consideration while exercising the powers of second review with reference to quantum of punishment awarded in departmental proceeding. It is required to be clarified that reasonableness of finding as to penalty means the Court has to find out if the concerned authority left out relevant factors or has taken into consideration irrelevant factors. One important aspect so far as reasonableness is concerned, is the fact which requires to be taken into consideration by the concerned authority is, where there are many choices open to the authority, the authority for the sound reason, has exercised the better choice for the penalty.

##. This leads us to the facts of the case and the very question which arose during the hearing was whether by virtue of decision of the Division Bench of this Court in the matter of SATSANGI SHISHUVIHAR KELAVANI TRUST & ORS V. P.N. PATEL AND ORS. as reported in [18] 1977 GLR pg.615, the Education Tribunal exercised the powers of primary review or secondary review. If the authority concerned has exercised the primary review and substituted its own view in place of view of the disciplinary authority, the decision of Tribunal becomes exfacie unsustainable. A further probe reveals that the Education Tribunal derives powers to deal with matters vide Section 39 of the Gujarat Secondary Education Act, 1972. Sub Section [9] of Section 39 of Gujarat Secondary Education Act, 1972 is as under :-

> "39[9] Where any order of dismissal, removal or reduction in rank of a headmaster, a teacher or a member of the non teaching staff of a registered private secondary school is decided by the tribunal to be wrong, unlawful or otherwise unjustified, the Tribunal may pas an order directing that the Head master, the teacher or, as the case may be, the member of the non teaching staff concerned shall be reinstated in service, or as the case may be, restored to the rank which he held immediately before his reduction in rank, by the manager, and the manager shall forthwith comply with such direction."

##. This provision on plain reading of it does not authorise the tribunal to modify the penalty imposed by the disciplinary authority. This can more be explained by referring to Section 11[A] of the Industrial Disputes Act, 1947 where the Labour Courts, Tribunals and National Tribunals by statutory provision incorporated under Section 11-A enjoy powers to award any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. In these circumstances, when the matter was decided by the Division Bench of this Court in above said case of SATSANGI SHISHUVIHAR KELAVANI TRUST & ORS V. P.N. PATEL AND ORS. [Supra], this Court ruled that for the just decision, the Tribunal has jurisdiction to pass even the order of backwages. Learned Tribunal relied upon this decision and assumed that it had an authority to modify the punishment awarded to respondent No.1. While I take into consideration the decisions of the Supreme Court as cited above, it becomes clear that by above said decision in the matter of SATSANGI

SHISHUVIHAR KELAVANI TRUST, this Court declared that the Education Tribunal had powers to review the decision of the disciplinary authority to arrive at a just conclusion. Again taking into consideration the Principles as laid down by the Supreme Court in above cited decisions, it can not by any stretch of reasoning be said that decision in 18th GLR 615 [Supra], was to mean to give primary review power to the Education Tribunal. This only leads to a conclusion that the Education Tribunal though by statute provided, had no express provision to deal with certain matters, law declared by this Court in above said decision, Education Tribunals were considered to have powers to review the decision of the disciplinary authority to arrive at just conclusion. But this power undoubtedly as decided by Supreme Court in above cited cases can be construed of secondary review and not of primary review. Therefore, it must be held that relying on above said decision of this Court, what was concluded by Education Tribunal in this case, could be only exercise of power of second review as propounded by the Apex Court.

##. Now reverting back to the facts of the case and the main controversy, the question which arises is whether Education Tribunal in this case was correct in condoning the penalty of dismissal and instead putting the employee to some financial loss still the charges proved against him.

##. Above noted are the principles and restrictions under which the power of second review be exercised by the Tribunals / Courts. Applying this principle to the facts of this case, we are required to advert to the background leading to conclusion of the Education Tribunal. Admittedly, the record clearly reveals that the respondent No.1 was appointed as Junior Clerk with effect from 12th September, 1979 in the school. After almost three years, in April, 1982, he was promoted as Senior Clerk. It is a matter of record that right from 1984 that is say from promotion of the respondent No.1, two vacant posts of Junior Clerk were available in the school management. However, these posts were not filled up and have not been filled till date. Respondent No.1 voiced his grievance in this respect. The Head Clerk, immediate superior of respondent No.1, was Son-in-law of the President of the management of school. It was his grievance that the said Clerk attended minimum work while remaining burden including of two vacant posts had to be shouldered by him. It is a matter of record that way back in 19th February, 1984 vide letter Exh.A of the inquiry proceeding, he wrote to the District Education

Officer as to what was the work being taken from him and need to appoint Junior Clerk was also pointed out. It is a matter of record that however the respondent No.1 frequently resorted to such representations. At Annexure-B of the inquiry proceeding, there is another such letter, which is of dated 19th January, 1987. However, it is found that the day of 19th of January, 1987 has played major role in the matter before us. Respondent No.1 requested by this letter to the Head Master concerned that there should be equitable distribution of work amongst Clerks available on establishment. However, in February, 1987, the school stopped assigning of work to the applicant. According to respondent No.1, he was threatened by the school management that his pay might be stopped by the school. The respondent No.1, therefore, filed an application bearing Application No.707 / 1987 before the Education Tribunal which granted ad-interim stay to respondent No.1 about assigning of the work and his salary was to be paid regularly. This application was disposed of by Education Tribunal on 13th of October, 1988 in above such circumstances. These facts on record clearly show that after January, 1987, relation between the respondent No.1 and management were strained. In 1987 in the month of November, a show cause notice was issued to the respondent No.1 followed by the chargesheet levelled against the applicant. As said before, departmental inquiry was conducted, respondent No.1 was dismissed and Education Tribunal was pleased to set aside dismissal while maintaining that charges were proved against the respondent No.1. In these circumstances, we shall have to examine whether the Education Tribunal had properly exercised the powers of secondary review as per the guidelines and the law as laid down by the Apex Court.

##. A pivotal issue would be, in my view, to have a look at the charges framed and proved against the respondent No.1. It is quite necessary to narrate charges for which he was punished to the extent of dismissal from service.

##. The record reveals that first and second charges are in respect of enjoying five days leave without fulfilling the conditions imposed by the management. The third charge is in respect of not taking charge of the cupboard etc. after returning from five and half days leave and not resuming the work of daily cash book. The forth charge is in respect of not accepting the service of memo in this regard. The fifth charge is in respect of neglecting the work in respect of writing cash book etc. The charges Nos.6 to 9 are in respect of making false allegations of harassment against the head master

including the charge that the delinquent was not carrying out the orders of the head master. The charge No.8 is in respect of not entering the time of entering and leaving the school. Charge Nos.10 and 11 are in respect of coming late in the school. Charge No.12 is in respect of correspondence sent directly to the District Education Officer without routing the same through proper channel of Head Master and the management. Charge No.13 is in respect of quarreling with Chokidar. Charge No.14 again is in respect of sending letters to the different authorities with a view to dishonour and bring the school to disrepute. Fifteenth charge is regarding short fall of Rs.121/- in cash but the same was not proved. Charge sixteenth relates to cash book which according to charge was not submitted by the respondent No.1 regularly for verification and signature of the head master. Charge seventeenth is also in respect of negligence of such duty. Charge No.18 is about false allegations by respondent No.1 against school management for discriminatory treatment to his daughter studying in the school. Charge No.19 is for negligence in preparing some scholarship bills. Charge Nos.20 - 21 are in respect of absence of the respondent No.1 in programme of flag hoisting ceremony of school on 15th August - independence day ceremony. Charges Nos.22 - 23 are in respect of movement of respondent No.1 that he was found roaming about the school building and was not found at his place of work. Charge Nos.24 - 25 relate to applicants' not attending the school for the staff meeting though he was so informed.

##. The above are the charges held to be proved against the respondent No.1. The question is, was it absolutely necessary to inflict punishment of dismissal for the above said charges. Applying principles laid down by the Supreme Court, it requires to be examined, whether Education Tribunal has rightly taken the decision to set aside the punishment of dismissal. While one says about reasonableness of punishment, one must consider whether the punishment is commensurating to the charges proved. It is amply clear that all the charges which are proved aginst the respondent No.1 are in respect of negligence of duty , irregularity or lack of punctuality. When these allegations are considered in the background of strained relationship of the employer and employee, it is clear and is a matter of record that the respondent No.1 was overburden with the work. It is a choice of the employer concerned to fill up the vacant posts or not and such employer management cannot be directed to fill up such posts. But the point is, admittedly those posts were vacant right from 1984 - 87. The respondent No.1

went on repeating that he was over burdened with the work and he gave list of work which he was carrying out. Those letters are on record of the departmental inquiry. At the same time, nothing could be found from the record that whether his grievance was redressed either by the management or by the authority like District Education Officer. But certainly circumstances culminated to an extent that management decided not to assign the work to the respondent No.1 with so called threat to stop his salary and thereafter, chargesheet came to be served against the respondent No.1.

##. Again while considering, whether the tribunal has rightly exercised second review, it shall have to scrutinise whether the tribunal had these facts in mind. Though the tribunal expressed in so many words in its judgment but by narrating facts and back history of the case, it is not at all difficult to assume that the tribunal wanted to convey that what was the attitude of the management towards the respondent No.1. If I do not go to an extent of victimisation and lack of bonafide but it can easily be deduced from the record that because of representations of respondent No.1 about over burden of work, the management was annoyed. While exercising the second review, it is permissible for the tribunal / High Court to take this fact into consideration and tribunal has rightly taken this background in consideration. As seen above, the charges proved against the respondent No.1, give clear impression even on bare reading that all the charges as said above relate to minor lapses on the part of the respondent No.1 which could have been corrected by the management even without resorting to the departmental proceeding and even if by resorting to departmental proceeding, then, exercising lesser choice punishment after giving opportunity to the delinquent to improve himself. No reasonable person would think to push an employee for these lapses to the darkness of economic death of extreme penalty. Therefore, Education Tribunal rightly came to the conclusion that charges proved were trifling not warranting extreme penalty of dismissal. Reasonableness would be to give an opportunity to an employee to improve his behaviour if at all it is found impudent, for which, a reasonable man could have exercised other lesser choice than the choice of extreme penalty of dismissal. It is not necessary that tribunal or High Court should mention in the decision that the punishment awarded by the disciplinary authority is the punishment which could not be arrived at by a reasonable man. But reading the reasons which tribunal has assigned for setting aside the penalty of dismissal, it is clear that the tribunal found that in

the background of the case, the charges were trifling and if there were any lapses of irregularity, irrationality or rigidity on the part of the employee, the same was because of over burden work. The tribunal has amply made clear that such temperamental aberration and resultant irregularity must not visit the extreme penalty of dismissal. It is not the case that grave charges against the employee are proved to the extent that he could not be tolerated for a minute on the administration. But it is a case where employee faced the departmental proceedings because he was over burdened with work which he was complaining since 1984. Perhaps non redressal of the grievance caused irrationality and lack of punctuality on the part of the respondent No.1 which is core subject matter of all twenty five charges levelled and proved against him. It is certainly shocking to the conscience of this Court that for such trifling charges, the delinquent is deprived of his bread. As said before, to be reasonable, disciplinary authority had lesser choices to be exercised to give an opportunity to an employee to improve himself. Nowhere it is a case that the respondent No.1 was so incorrigible that all the hope of his improvement had to be abandoned. Therefore, Education Tribunal has rightly in exercising the second review has found that extreme penalty of dismissal was not reasonable, not proportionate and finding of disciplinary authority was finding which would not be arrived at by any reasonable person in the circumstances for the trifling charges of irregularity proved against the respondent No.1. It is not the law that in second review, High Court / Tribunal must act as rubber stamping authority of administrative authority. The law lays down certain restrictions and decides the manner in which the powers of second review should be exercised and exercising the power of second review when miscarriage of justice is noticed, it becomes pious duty of the High Court / Tribunal to strike and correct the errors, and to do justice.

##. It is pertinent to note here that the Division Bench of this Court in case of ASHWIN N. ACHARYA VS. OKHA PORT as reported in 1993 [2] GLH 293 in Para-10 observed as under :-

> "10. The same result would follow if the question is examined from a different angle in the light of the alternative submission urged before us by Shri Patel for the petitioner. The petitioner's discharge from service was sought to be justified on the ground of his past

misbehaviour. It transpires from the judgment of the Labour Court that it was not the case of the respondent herein in the course of the adjudication proceedings that the present petitioner was incorrigible with respect to his behaviour with his fellow workmen or with superior officers. In that view of the matter, the question arising before us is whether or not the extreme penalty of economic death should have been inflicted on him for his past lapses with respect to his behaviour. Section 11A of the Act empowers the forum named therein to substitute a less severe punishment for the punishment imposed by the employer on the workman. It would mean that it would be open to the forum created under the Act to examine the proportionality of punishment in the light of proved misconduct of the employee. For the time being we assume in favour of the respondent that the petitioner is fond guilty of misconduct on account of his rude behaviour with his fellow workmen or with his superior officers. As aforesaid, it was not the case of the respondent before the labour court that he was incorrigible or beyond redemption. In that view of the matter, it was the duty of the labour Court to have addressed itself on the question whether or not the punishment inflicted on the petitioner was disproportionate to the ground of his misconduct arising from his rude behaviour with his fellow workmen or with his superior officers. With respect, the learned Presiding Officer of the Second Labour Court has missed this aspect of the case. We find that the extreme punishment of severance of the tie of employment inflicted on the petitioner in this case is grossly disproportionate to his misconduct arising from his alleged rude behaviour with his fellow workmen or with his superior officers and more particularly so when his apologies were accepted. Different considerations might have arisen if his apologies were not accepted and the chargesheet might come to be issued for his such misconduct of rude behaviour. Once we come to the conclusion that the punishment inflicted on the petitioner is out of proportion, we have only to set aside such punishment."

##. In above mentioned case of ASHWIN N. ACHARYA V. OKHA PORT, the workman was alleged to have misbehaved

with the co-workers. He tendered apology that was accepted even then in departmental proceeding, he was came to be dismissed and this Court while exercising the second review observed as above. In the present case, even an opportunity to the employee to improve himself has not been given. It is also pertinent to refer to the observations of this Court in the matter of SARDARSINH DEVISINH V. THE DISTRICT SUPERINTENDENT OF POLICE SABARKANTHA DISTRICT AND OTHERS as reported in 1985 [2] GLR 1368. This was the case where the police constable remained absent without leave for 150 days and was punished for dismissal from service. This Court has observed in para-7 as under :

"7. In the instant case no punishment was imposed on the petitioner for remaining absent without leave in the past. He remained absent without obtaining leave from the disciplinary authority. That means that the misconduct proved is that he remained absent without leave for 150 days. The question then is what punishment should be imposed on him for this misconduct ? Is it such that an opportunity to improve would be a futile exercise ? If the petitioner is visited with a penalty which is short of removal or dismissal from service, is there evidence to suggest that he will not learn a lesson and improve in future ? The answer is there is no such evidence. The guilt established against the petitioner can never fall in that category which would necessitate termination of service. In my opinion, the guilt would fall in the category where an opportunity to improve by visiting the petitioner with a lesser penalty would serve the ends of justice. No one says that such conduct of remaining absent without leave should be tolerated, nay, a person guilty of such conduct must suffer punishment. But it is not necessary to be so harsh as to throw him out of service. It may be realised that being a petty police constable, his absence may not be even felt as much as it would be felt if a higher level officer behaves in this fashion. In a case like this, I think the ends of justice would be met if instead of terminating the services of the petitioner by an order of dismissal, the petitioner is visited with the penalty of withholding of two increments with future effect. This economic loss for him would be a constant reminder that he should not misbehave in further

> as he had done in the past. But if despite this he does not show improvement and commits similar defaults, the authorities would be justified in imposing a harsher penalty in future. I am, therefore, of the opinion that if is not possible to sustain the order of dismissal passed against the petitioner because it is clearly disproportionate to the established guilt."

##. It is therefore clear that punishment of dismissal for such petty charges is wholly unreasonable. Education Tribunal perhaps addressed itself that was the employee incorrigible beyond redemption ? The Tribunal found the answer in negative and rightly so, particularly with reference to the backdrop of the whole matter. The tribunal also examined the background of the lapses on the part of the respondent No.1 and came to the conclusion that such irritable behaviour mostly was on account of over burdening of work. It is also pertinent to note that nothing is on the record to satisfy the judicial conscious that the work load for which respondent No.1 had been complaining was never thrust upon him by the school management, nor could it be found that any redressed arrangements were made. Even if the substance of the charges is considered, there is nothing in the allegations which could not be cured by any other measures. Above all, no law permits the authority exercising primary review to act arbitrary, in defiance of logic or in a manner no reasonable person would act in such circumstances. The order of dismissal of the respondent No.1 suffers from above vices. The tribunal while exercising secondary review rightly caught hold of such vices and corrected the conclusion of competent authority. The conclusion arrived at by the tribunal in respect of modifying the penalty, therefore, is beyond the scope of interference by this Court.

##. In the result of above discussion, this Cout does not find any reason to interfere in the decision of the Education Tribunal impugned in this petition. The petition, therefore, stands dismissed with no order as to costs. However, interim relief granted by this Court to the petitioner on 9th October, 1990 shall remain in operation upto 30th November, 2002. Rule discharged.

Date : 6-9-2002 [J. R. Vora, J.]

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